Supreme Court, U.S.
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No. 93-2025

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JUDITH SPALETTA,

Petitioner,

V.

COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCATION and COUNTY OF MENDOCINO,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeal
State of California
First Appellate District

BRIEF IN OPPOSITION

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RETIREMENT ASSOCIATION

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the California Court of Appeal properly found that Petitioner wrongfully refused to submit to a medical examination ordered by the County Employees Retirement Association.

2. Whether the California Court of Appeal decision violates Petitioner's right of privacy.

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BRIEF IN OPPOSITION

JURISDICTION

Respondent COUNTY OF MENDOCINO EMPLOYEES RETIREMENT ASSOCIATION ("ASSOCIATION") disputes that jurisdiction has been properly invoked in this case. Petitioner states that jurisdiction is sought pursuant to

28 U.S.C. §1257. That section provides that review is proper where the validity of a State statute is questioned on the ground of its being repugnant to the United State Constitution. Petitioner does not contend in her Petition that the subject State statute, California Government Code §31723, violates the United States Constitution.

Furthermore, Supreme Court Rule 10 sets forth three categories of reasons for granting a petition for writ of certiorari, none of which are applicable here. First, there is no United States Court of Appeals decision involved here. Second, no federal question has been decided by the California Courts in this case. Third, no important question of federal law, not yet settled by this

Court, has been decided by the California courts in this case.

This case does not present grounds for exercise of jurisdiction by this Court, and the petition accordingly should be denied.

STATEMENT OF THE CASE

The California County Employees Retirement Law of 1937 sets forth the standards by which a public employee may be deemed eligible for disability retirement. This statutory scheme is set forth in California Government Code §§31720 et seq. Of particular relevance here is §31725, which states that it is up to the Board of Directors of the County Retirement Association to determine whether an applicant for disability retirement is in fact permanently incapacitated for the

performance of duty, and §31723, which allows the Board to order an applicant to be medically examined to determine whether a disability exists.

The Association did order Petitioner to be medically examined. She refused to be examined. The Association obtained an injunction from the Superior Court mandating Petitioner's attendance at the Association-ordered exam. The Court of Appeal upheld the Superior Court's decision. The California Supreme Court refused to review the case.

Now Petitioner seeks review by this Court for two basic reasons: First, Petitioner asserts that the injunction was improperly granted because she did nothing wrong. That is, Petitioner argues that she has not refused to attend the medical exam. Second, Petitioner

asserts that since she already has been medically examined by a doctor of her choice in connection with the disability application, it is an invasion of her privacy to be examined by a doctor chosen by the Association.

Both of these arguments lack merit, as discussed below.

A. <u>The Petition Should Be Denied Because Petitioner Has Refused To Attend The Medical Exam, Thus Committing A "Wrongful Act".</u>

Petitioner argues that the injunction issued by the California trial court compelling her to attend a medical exam is unlawful. She contends that she did not refuse to attend the medical exam ordered by the Association on August 21, 1992 because no specific time or date were set by the Association for the exam. What Petitioner fails to mention is the

letter written by her attorney to the Association's attorney on or about June 4, 1992. In that letter, Petitioner's attorney states: "Mrs. Spaletta does decline to attend the examinations you have set up." See Appendix at A4.

At no time after issuance of the Association's August 21, 1992 order did Petitioner come forth to be examined. Despite repeated attempts to schedule the exam, Petitioner continued her refusal to be examined. That is why the Association was forced to file a complaint in the Superior Court seeking an injunction compelling Petitioner to attend the exam. Not once throughout the lower court proceedings did Petitioner simply request that a date be set for the exam.

Petitioner has fought the Superior

Court's order through two higher California Courts and now brings this matter before the U.S. Supreme Court. It is extremely disingenuous for Petitioner to claim that she has committed no "wrongful act" and has not refused to attend the medical exam, when she has fought the injunction through four court systems for the past two years.

B. **The California Statutes Have Been Properly Interpreted By The California Courts To Allow For More Than One Medical Exam During Retirement Disability Proceedings.**

There is no dispute that the Association has the obligation to make a determination about whether an applicant for disability retirement is in fact disabled from work. To make this determination, the State Legislature has provided, in California Government Code

§31723 (set forth at p.6 of Petition), that the Association may require certain proof of the applicant's medical condition. Section 31723 states that such proof may include a medical exam paid for by the applicant or a medical exam ordered by the Association.

Petitioner argues that this statute allows only one medical exam -- either one she pays for or one the Association pays for. She asserts that since she already has paid for an exam herself, the Association cannot require her to attend any further exams. She argues that any further medical exams will invade her privacy.

The California Courts ruled that Petitioner read §31723 too narrowly, and held that the Association had the power to acquire such proof as it felt

necessary to make a proper decision. The statute does not limit the Association to either an exam paid for by the applicant or an exam paid for by the Association. The statute says the Association may require such proof as it deems necessary, including applicant exams or Association exams.

It would not make sense to limit the evidence before the Association to the one exam paid for by the applicant. What if the applicant submitted a report from a physician not qualified in the area of the applicant's disability? What if the applicant had multiple disabilities, such as both orthopaedic and mental disabilities? Obviously, two exams would be needed in such a case. The California Courts recognized that the statute should not be read so narrowly that it would

prevent the Association from making intelligent decisions based on the evidence.

There is a constitutional right of privacy in the State of California, but that right must be harmonized with existing statutes. Petitioner's state of health is directly at issue. Whether she is mentally and physically capable of performing her job, or whether she is truly disabled, is directly at issue. The medical exam ordered by the Association and enforced by the California Superior Court and California Court of Appeal is not intended to invade Petitioner's privacy. The exam is intended to provide the Association with the evidence it needs, and to which by statute it is entitled, in order to carry out its duties. In such cases, there is

no wrongful invasion of privacy.

As stated by the California Court of Appeal in Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145, 162, 262 Cal. Rptr. 496 (1989):

> We also recognize that the California Constitutional right of privacy created by the 1972 amendment to our state constitution is not absolute. [Cites] As observed by the California Supreme Court, "'the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest.'"

[quoting from White v. Davis, 13 Cal. 3d 775, 864, 210 Cal. Rptr 94, 533 P. 2d 222 (1975).]

Since the Association has a compelling interest in making disability determinations based on sufficient evidence, the medical exam authorized by

statute, ordered by the Association, and compelled by the trial and appellate courts does not impermissibly interfere with Petitioner's privacy rights.

CONCLUSION

Petitioner's petition for writ of certiorari should be denied. This Court lacks jurisdiction to grant the petition, there has been no interference with any of Petitioner's constitutional rights, and the lower courts made appropriate rulings below.

DATED: June , 1994

Respectfully Submitted,

GRAHAM, CONE, McKINNEY
ROBERTS & JACKSON

By: _____

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APPENDIX

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Re: In re Application of Marsha Young

Dear Mr. Graham:

Government Code Section 31723 states:

> "The Board may require....a medical examination at the expense of the member, as it deems necessary or the board may [sic] upon its own motion may order a medical examination to determine the existence of the disability."

Mrs. Spaletta does not claim a psychiatric injury. You have obtained an order signed by Mr. Knudson that she see a psychiatrist. Inasmuch as she is only claiming a physical injury, I do not see that the board has any right whatsoever to request a psychiatric, rather than a medical, examination.

Also, I'd like to refer you to 58 CAL JUR 3d, "Statutes," Section 136:

> "Although, ordinarily, the word 'and' connotes a conjunctive meaning, while the word 'or' implies a disjunctive or alternative meaning, these words may sometimes be substituted for each other in construing statutes. But this substition is sanctioned only

> where such a construction is necessary to carry out the obvious intent of the legislature as gleaned from the context, or where the acts [sic] itself furnishes cogent proof of legislative substitution."

The word "or" in 31723 evidently means "or" in the ordinary sense. As I mentioned to you on the phone before you abruptly hung up on me, Mrs. Spaletta has had a medical examination at her own expense, she submitted the results to the board and to you in answer to interrogatories, and you took a lengthy deposition of her physician, Dr. Anderson, in Santa Rosa.

I shepardized 31723 and could find nothing to indicate to me that your implicit interpretation of the statute, that a medical examination at the expense of the member AND a medical examination by another doctor, in this case, an insurance defense doctor, may be required.

If you can send me authority for your interpretation, I will be glad to consider it.

If you cannot, then Mrs. Spaletta does decline to attend the examinations you have set up.

Sincerely,

/s/ Phyl Allen Diri

Phyl Allen Diri

PAD:hs

cc: Sandra Applegate, Deputy County Counsel